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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KEISHA D. ADAMS,

Plaintiff and Appellant,

v.

COLUMBIA RIVERSIDE, INC.,

Defendant and Respondent.

D075134

(Super. Ct. No. RIC1609426)

APPEAL from a judgment of the Superior Court of Riverside, Gloria Connor Trask and Dallas Holmes, Judges. Affirmed.

Edwards Law and Rex Eugene Edwards for Plaintiff and Appellant.

Ford & Harrison, Allison V. Saunders and Angela S. Fontana for Defendant and Respondent.

Appellant Keisha Adams challenges the court's denial of her request for discretionary relief under Code of Civil Procedure section 473, subdivision (b) to set aside summary judgment and grant leave to amend the complaint. She contends her attorney's failure to request leave to amend the complaint sooner was the result of

excusable neglect, and she sought relief diligently. We conclude the court did not abuse its discretion in denying the request, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Adams began working at Columbia Riverside, Inc. dba Riverside Community Hospital (the Hospital) in February 2006. In July 2015, she was working as a unit secretary when she accessed the clinical part of a coworker's medical records after the coworker, who had been a patient at the hospital, was discharged. Adams claimed she was instructed to do so by two charge nurses on duty at the time of the access; one charge nurse denied this.

Following an investigation, the Hospital concluded Adams's actions violated the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as did the California Department of Public Health. To discipline Adams, on July 30, 2015, the Hospital required her to sign a Last Chance Agreement or be terminated. Under the terms of the agreement, if Adams were to violate any hospital policy, procedure, or rule of conduct during the subsequent 12 months, the violation would constitute just and sufficient cause for immediate termination.

The Hospital terminated Adams's employment eight and a half months later, on April 14, 2016, after concluding she had violated the Hospital's attendance policy with excessive unexcused absences over the preceding 12 months, including time from before Adams signed the Last Chance Agreement.

Adams filed a complaint against the Hospital on July 22, 2016 for wrongful termination, alleging six causes of action: (1) violation of the California Family Rights

Act (CFRA), (2) retaliation in violation of CFRA, (3) violation of the Family Medical Leave Act (FMLA), (4) retaliation in violation of FMLA, (5) retaliation in violation of Labor Code section 1102.5, subdivision (b), and (6) wrongful termination in violation of public policy. Only the fifth and six causes of action are the subjects of this appeal.¹

In her fifth cause of action, Adams alleged the Hospital retaliated against her for notifying the administration about a HIPAA violation that occurred August 6, 2015, when the Hospital distributed to about 70 employees an email that referenced Adams's partner by name. In her sixth cause of action, Adams alleged her termination violated public policy, in part based on her complaint about the August 7 HIPAA violation.

The Hospital filed a motion for summary judgment on May 12, 2017. The opposition was due July 13, 2017, and the hearing was set for July 27, 2017. On July 6, 2017, Adams filed an ex parte application for an order continuing the hearing and extending the time to respond because Adams was waiting for requested discovery.

In the memorandum of points and authorities accompanying the ex parte application, Adams explained she was targeted for termination because she informed the Hospital that staff members routinely accessed patient records after discharge for administrative purposes, but the Hospital did not investigate these claims. She theorized she was given the Last Chance Agreement and the attendance policy was selectively enforced against her because she reported this widespread access of patient records.

Adams vacated the ex parte hearing on July 7, 2017.

¹ Because facts related to the first four causes of action are not relevant to the appeal, we have not included them.

On July 13, 2017, Adams timely filed an opposition to the Hospital's motion for summary judgment.² She again argued her termination for violation of the Last Chance Agreement and attendance policy was a pretext, contending she was terminated for reporting widespread access of patient records postdischarge to senior management.

On July 14, 2017, Adams filed an amended opposition, which added a table of contents and a table of authorities. The amended opposition was substantively the same as the original.

On July 18, 2017, Adams filed an ex parte application for leave to file a second amended opposition to summary judgment. Adams's attorney, Rex Edwards (Edwards), had been taking medication, and his declaration stated that the side effects "severely and negatively impacted" the opposition, causing it to be poorly-organized and incomplete because it was missing citations to authorities and undisputed material statements of fact, and also because there were undisputed material statements of fact that had not been incorporated when they should have been. The brief explained Edwards had been taking prescription medicine since June 30, 2017 to treat nerve pain resulting from a recent back injury, and the medication caused reduced productivity and some short-term memory loss. He stopped taking the medication July 14. The court granted this request and continued the hearing on the motion for summary judgment to August 4.

On July 20, 2017, Adams filed a second amended memorandum of points and authorities in opposition to the motion for summary judgment. Adams again argued her

² Adams also filed her responses to the Hospital's separate statement of undisputed facts and evidence in support of her opposition on July 13, 2017.

employment was terminated because she reported her coworkers had been accessing patient information after patients had been discharged. She contended that the Hospital required her to sign the Last Chance Agreement and eventually terminated her employment to avoid investigating her claim of widespread HIPAA violations, which could have exposed the Hospital to financial penalties.

The Hospital filed its reply July 28. The Hospital argued the fifth cause of action failed because Adams had abandoned the theory pleaded in the complaint, which was that its retaliation was in response to Adams's complaint that the Hospital disclosed her partner's medical information. It also filed several objections to the evidence Adams had submitted in connection with the retaliation theory raised in her opposition memorandum. This evidence included an August 6, 2015 letter that 20 nurses and unit secretaries signed, stating they "routinely go into patient[s] records after a patient has been discharged for a variety of reasons including returning their left behind belongings." The court sustained these objections, finding the evidence irrelevant.³

At the August 4, 2017 hearing on the motion for summary judgment, Adams's attorney opened with an oral motion for leave to amend the complaint. The court told him to "set that aside for a moment" because the matter was before the court on a motion for summary judgment.

After the parties addressed the motion for summary judgment, Adams's attorney again orally moved for leave to file an amended complaint to add allegations that Adams

³ The court found other evidence to constitute inadmissible hearsay.

reported to hospital administrators the widespread access of patient medical records postdischarge. Edwards explained that the issue of widespread HIPAA violations as a basis for the retaliation claim did not become apparent until after the complaint was filed; thus, he could not address it in the summary judgment motion without the complaint being amended. The court agreed with his assessment, but it commented there was "nothing new there," because the information was available before the opposition to summary judgment was due, and the court had granted a continuance. The court noted Adams had multiple occasions to request leave over the previous weeks and months, including when she had leave to file an amended opposition to summary judgment; it found the motion untimely and said granting it would be extremely prejudicial to the Hospital. The court denied the motion for leave to amend the complaint and granted the motion for summary judgment. Judgment was entered on August 28, 2017.

On November 6, 2017, Adams filed a motion under Code of Civil Procedure⁴ section 473 subdivision (b) (hereafter section 473(b)) requesting to set aside the summary judgment and seeking leave to file an amended complaint. Adams argued her attorney's neglect was the result of a mild cognitive impairment caused by vascular disease and a stroke, discovered after the hearing. Adams included proposed changes to the complaint; she did not attach a proposed amended opposition to summary judgment to explain why the outcome would change in light of the new factual allegations.

⁴ Further undesignated section references are to the Code of Civil Procedure.

In his oral argument, Edwards explained he initially believed side effects of the medication for the back injury caused reduced performance, but he later discovered he was suffering mild cognitive impairment caused by vascular disease and a stroke. He argued that although there was evidence early in the case of whistleblowing via the letter signed by other unit secretaries and nurses indicating they had entered discharged patients' records, the import of that letter was not apparent until February 2017, when deposition testimony revealed that if Adams's claim were true, it would expose the Hospital to significant fines of \$25,000 per incident, and at least one administrator expressed concern that Adams should not be disciplined when others were not because that would indicate there was no clear policy in place.⁵ The court previously determined this evidence was irrelevant because it did not relate to the claims in the complaint or it was inadmissible hearsay.

The Hospital argued the failure to submit a copy of the proposed, complete first amended complaint was fatal. It also argued Adams failed to supply additional evidence that would lead to a different outcome because evidence she referenced was missing or had been excluded as hearsay, and because Adams's admission that she did not believe accessing patient records after their discharge violated HIPAA meant she could not meet the requirements of Labor Code, section 1102.5, subdivision (b) as a matter of law. Finally, the Hospital argued there was no evidence the attorney's illness was the cause of the deficiency in the work product, and Adams did not act diligently.

⁵ This deposition testimony was not submitted to the court and is not in the record.

The trial court denied Adams's request to set aside the judgment, reasoning Adams failed to (1) provide a draft of the amended opposition to the motion for summary judgment, (2) offer additional evidence that would result in denial of the summary judgment, and (3) act diligently. This appeal followed. (§ 904.1, subd. (a)(2).)

DISCUSSION

A

Legal Principles

Section 473(b) gives a trial court discretion to set aside a judgment or dismissal taken through a party's mistake, inadvertence, surprise, or excusable neglect. This discretionary relief is available when the moving party brings a motion in a procedurally proper manner, a proper ground for relief exists, and the moving party diligently seeks relief not more than six months after the challenged judgment is entered. (*Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 229.) Additionally, there must not be prejudice to the opposing party if the court grants relief. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258 (*Zamora*).)

We review a court's denial of discretionary relief under section 473(b) for abuse of discretion. (*Zamora, supra*, 28 Cal.4th at p. 257.) "The scope of the trial court's discretion under section 473 is broad [citation] and its factual findings in the exercise of that discretion are entitled to deference." (*Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 24 (*Minick*).) " 'A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand.' " (*Id.* at p. 25, quoting *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 85.) It "may be found only if a grant of

relief 'exceed[s] the bounds of reason.' " (*Minick*, at p. 24, quoting *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.)

B

Procedural Challenges

Adams contends the trial court's reliance on her failure to attach an amended opposition to a motion for summary judgment is an abuse of discretion that improperly led to the denial of relief. The Hospital contends Adams failed to comply with the requirement that she attach the pleading proposed to be filed with the motion, which is a prerequisite to relief under section 473(b).

Section 473(b) requires the moving party to provide " 'a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted.' " (*Austin v. Los Angeles Unified School District* (2016) 244 Cal.App.4th 918, 932 (*Austin*)). The purpose of this requirement is to ensure the moving party shows good faith and is ready to file the pleading if leave is granted. (See *id.* at p. 933.) Accordingly, "courts have held substantial compliance to be sufficient." (*Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 402.)

In *Austin*, the moving party did not include a proposed memorandum in opposition to summary judgment, but the court nonetheless concluded she substantially complied because her various filings requesting relief from judgment had included the factual contentions and legal arguments that would have been contained in the opposition memorandum. (*Austin, supra*, 244 Cal.App.4th at p. 933.)

Here, the minute order references Adams's failure to provide a proposed opposition to summary judgment as one basis for its decision.⁶ However, the Hospital's procedural argument before the trial court focused on Adams's failure to attach a complete proposed first amended complaint. The Hospital now argues that Adams failed to comply with the statute because she did not submit a copy of a proposed amended opposition to summary judgment.

Because Adams sought to amend her complaint, that was the pleading section 473(b) required her to submit. Although a clean copy of that document was not served on the Hospital, a document that included the proposed additional allegations was supplied, demonstrating Adams's readiness to proceed with an amended complaint. (See *Austin, supra*, 244 Cal.App.4th at p. 932.) Additionally, Adams's legal arguments regarding the whistleblower and retaliation legal theories stemming from the additional allegations were repeatedly briefed, appearing in the July 6 ex parte application for an extension of time, the July 13 opposition to summary judgment, the July 14 amended opposition to summary judgment, and the July 20 second amended opposition. If Adams were required to submit a proposed, amended opposition, her previous memoranda containing the relevant legal arguments supplied substantial compliance.

Adams did not argue any new legal theory or present newly-acquired evidence in connection with the section 473(b) hearing. She merely sought to conform the allegations in the complaint to her previously made legal arguments. Adams attached the additional

⁶ The court explained it was following its tentative decision; however, the tentative decision is not in the record before us.

complaint allegations to her section 473(b) motion; thus, she met the procedural requirements for her requested relief. Nonetheless, we affirm the court's denial of relief on other grounds, as we explain *post*.

C

Proper Ground for Relief

Adams contends a proper ground for relief exists because her attorney suffered from cognitive impairment of which he was not aware while he was preparing the opposition, and that his cognitive impairment supplies the basis for excusable neglect. The Hospital contends the illness could not be the cause of the attorney's neglect because the evidence at issue was in his possession before he suffered any cognitive impairment and also because there would be no different outcome were the requested relief granted. The Hospital has the better argument.

To warrant relief under section 473(b) due to neglect, the moving party "must demonstrate that the error was excusable, since the attorney's negligence is imputed to the client." (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419, citing *Zamora, supra*, 28 Cal.4th at p. 258.) " 'Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances.' " (*Huh*, at p. 1419; *Zamora*, at p. 258.) Additionally, because the law favors a hearing on the merits when possible, it must appear that a different result would probably be reached were the judgment set aside. (*Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 Cal.App.2d 275, 282 (*Transit Ads*).)

When the excuse offered is illness, the party offering the excuse must demonstrate the "illness was so disabling that the neglect consisted only of acts or omissions of a kind which a reasonably prudent sole practitioner caught in similar circumstances would commit." (*Transit Ads, supra*, 270 Cal.App.2d at p. 286.) "Illness of counsel which actually disables him from timely compliance with the statutory rules of procedure constitutes excusable neglect if he moves promptly for relief as soon as his disability terminates or attenuates to the extent that a reasonable [person] under similar conditions would take action for relief." (*Id.* at p. 280.)

Adams compares her situation to the one in *Minick*. There, the plaintiff filed a personal injury suit against the city arising out of a bicycle accident. (*Minick, supra*, 3 Cal.App.5th at pp. 18-19.) The attorney prepared and filed an opposition. (*Id.* at p. 19.) During the hearing, he experienced physical distress and was taken by ambulance to the hospital, and the court continued the hearing. (*Ibid.*) At the continued hearing, the court sustained foundational objections to the evidence attached to the opposition, concluded *Minick* failed to provide admissible evidence to support his claim, and granted the defendant's motion for summary judgment. (*Id.* at pp. 19-20.)

Minick filed a motion for discretionary relief under section 473(b), requesting the court set aside the judgment. (*Minick, supra*, 3 Cal.App.5th at p. 20.) His attorney submitted a declaration explaining he had suffered progressively worsening medical issues for which he had been seeking medical attention leading up to summary judgment, but he did not realize he was cognitively impaired at the time. (*Id.* at pp. 20-21.) He also submitted new declarations to supply the missing foundational information, as well as

additional and better-quality photographs to demonstrate disputed material facts. (*Id.* at pp. 21-22.)

The trial court concluded the attorney had suffered a medical condition of which he was not aware, which affected his ability to exercise proper judgment, and which led him to act in a way contrary to his usual practice. (*Minick, supra*, 3 Cal.App.5th at p. 23.) Concluding the attorney demonstrated inadvertence or excusable neglect, the trial court granted the section 473(b) motion. (*Minick*, at p. 23.) Because the trial court found the attorney's explanation credible, and the court's decision did not exceed the bounds of reason, the appellate court concluded there was no abuse of discretion. (*Id.* at p. 28.)

In contrast, in *Transit Ads*, the attorney took extensive medication for weight loss under the treatment of a doctor, and the medication adversely affected him, causing him to be absent from the office for long periods during a time when he was also without secretarial help. (*Transit Ads, supra*, 270 Cal.App.2d at p. 286.) During the month at issue, the attorney failed to timely file an answer after seeking and receiving two extensions from opposing counsel. (*Id.* at p. 283.) The appellate court concluded that on the record before it, there was "no showing that disabling illness, and not inexcusable neglect, was the real cause for the default" because the attorney was aware of the medical

condition but failed to act as a reasonably prudent person would in that situation.⁷ (*Id.* at pp. 287-288, 280.)

Here, Edwards had been aware of short-term memory loss, coordination issues, and fatigue, which he reported to the court in July 2017 when Adams asked for leave to file an amended opposition to the motion for summary judgment. At the time, Edwards attributed these deficiencies and reduced productivity to the daily use of prescription medication to treat a back injury. Although the court granted the request to file an amended opposition, Adams did not then seek leave to file an amended complaint to add or change the allegations in the fifth and sixth causes of action to align with evidence she had submitted showing she had reported widespread employee access of patient records postdischarge and the hospital administration's concerns about the potential ramifications of her allegations if true. It was not until the continued hearing that Adams requested leave to amend the complaint to add new facts, a request the court denied. After the hearing, Edwards realized his error and questioned his poor judgment, prompting him to seek additional medical treatment.

In September 2017, Edwards learned he had suffered a stroke some time since 2012 and was suffering from vascular disease of the brain, causing mild cognitive impairment, with short-term memory issues and diminished reasoning skills. It is this

⁷ In *Minick*, the appellate court in dicta suggested *Transit Ads* might be decided differently today because it is a default case that predates the mandatory provision of section 473(b). (*Minick, supra*, 3 Cal.App.5th at p. 32.) However, it also highlighted as a key factual distinction between *Transit Ads* and *Minick* that the attorney in *Transit Ads* was not found to have been unaware of his impairment (see *ibid*), a distinction relevant here as well.

mild cognitive impairment that Edwards contends was actually impacting his abilities at the time he was preparing the opposition to the motion for summary judgment. He contends his situation is more like the one in *Minick* than the one in *Transit Ads* because he was not aware of the true medical condition affecting his ability to exercise proper judgment at the time he was preparing the opposition papers. Thus, he argues, his actions are the result of excusable neglect.

However, as the trial court noted, Adams had multiple opportunities to request leave to amend after coming into possession of the evidence and before Edwards experienced any impairment; Adams was aware of information pertaining to the alternative retaliation claim before February 2017. Additionally, even accepting Edwards's explanation that the import of the evidence was not clear until the deposition of a hospital administrator on February 28, 2017, Adams had the necessary information to request leave to file an amended complaint before April, when Edwards first began to notice performance-related concerns.

While Adams argued in the section 473(b) motion that Edwards was not aware of the extent of his impairment until the evening before the motion for summary judgment hearing, when he realized a number of undisputed material facts he had submitted were not in the complaint, the court could reasonably have determined that, like the attorney in *Transit Ads*, Edwards was aware of his medical condition because concerns about the quality of the motion for summary judgment prompted him to request leave to amend it. Edwards's actions suggest he was aware of his limitations but believed he could handle the issues with an extension of time. Accordingly, it was not unreasonable for the court

to conclude, as it did, that there was sufficient time to make a timely motion for leave to amend the complaint, but Adams failed to do so.⁸

Next, the Hospital argues that even were the court to conclude there was excusable neglect and grant leave to file the amended complaint, Adams is unable to show a different result would be reached; thus, the judgment should not be vacated because a proper ground for relief does not exist. (*Transit Ads, supra*, 270 Cal.App.2d at p. 282 [must show different result would probably be reached if judgment were set aside].) We agree.

Labor Code section 1102.5, subdivision (b) prohibits an employer from retaliating against an employee for disclosing information to a government or law enforcement agency when the employee reasonably believes the information discloses a violation of state or federal statute, rule, or regulation.

Once a plaintiff makes a prima facie case, a defendant can defend against a retaliation claim by showing there was a legitimate business reason for the action. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138.) If the employer produces evidence of its legitimate business reason, the burden shifts back to the employee to provide substantial evidence that the employer's proffered reasons are

⁸ The court indicated that Adams's situation was also distinguishable from the situation in *Minick* because Adams did not submit new evidence like the attorney did in *Minick*. We need not decide whether new evidence is a requirement for relief under section 473(b) because, as we explain *post*, there was evidence for the court to consider for the first time at the section 473(b) hearing that it had not previously considered in connection with the motion for summary judgment.

pretextual. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1109.)

Adams did not submit any newly-acquired evidence in connection with the section 473(b) motion, but she argued some previously excluded evidence should be considered, which meant, for all intents and purposes, the court had before it new evidence to consider. This included the letter signed by 20 unit secretaries and nurses indicating they routinely accessed patient medical records after discharge. However, this evidence does not adequately support Adams's request for relief from judgment because it does not show she had reasonable cause to believe that the information disclosed a violation of statute or regulation (Lab. Code, § 1102.5, subd. (b); see, e.g., *Carter v. Escondido Union High School Dist.* (2007) 148 Cal.App.4th 922, 933 [act must be motivated by belief law has been broken]); Adams conceded that she did not believe she was reporting a violation of law or policy because she did not believe accessing patient records postdischarge violated any statute or regulation.

In her reply, Adams contends that while she did not believe the types of actions she reported violated HIPAA when she committed them herself, by the time she reported them to the Hospital, she had been informed the conduct was a violation; therefore, she knew she was reporting HIPAA violations. However, this argument relies on email evidence between hospital administrators that indicated she had shared the information with the Hospital before she signed the Last Chance Agreement. While this evidence may have supported Adams's proposed amendments to the complaint and her theory of retaliation, the court did not consider it because it had excluded the evidence as hearsay,

and Adams did not attempt to overcome the hearsay objection during the section 473(b) hearing.

Moreover, even if the letter indicated a reasonable belief of widespread HIPAA violations, the Hospital had demonstrated a legitimate, nondiscriminatory reason for placing Adams on a Last Chance Agreement: she admitted she had accessed a coworker's medical records after discharge, which the California Department of Public Health concluded violated HIPAA. Adams signed this agreement before submitting the letter she claims is the basis of the retaliation. The Hospital also offered a reason for her termination of employment: she violated the Hospital's attendance policy, a fact which Adams does not dispute. Accordingly, it was not an abuse of discretion to decline to set aside the summary judgment and to deny the request for leave to file an amended complaint.

D

Diligence & Prejudice

Although both parties address the issue of diligence, neither does so within the context of section 473(b)'s requirement that the party seeking relief under that motion do so within a reasonable time, not to exceed six months after judgment. (See *Zamora*, *supra*, 28 Cal.4th at p. 258.) Instead, they focus on whether the request for leave to

amend the complaint came after unreasonable delay during the pendency of the action and whether there is undue prejudice to the Hospital.⁹

Because the trial court did not abuse its discretion in determining there was no excusable neglect and the admissible evidence before it would not change the outcome, we conclude there is no proper ground for relief. (See *Henderson v. Pacific Gas & Electric Co.*, *supra*, 187 Cal.App.4th at p. 229.) Thus, we need not reach the issue of whether Adams acted diligently in seeking the requested relief.

DISPOSITION

The judgment is affirmed. Appellants are to bear costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

AARON, J.

DATO, J.

⁹ The Hospital briefly addresses the length of time between the entry of judgment and Adams's section 473(b) motion, but it does not argue that period of time violated the requirements of section 473(b).